

1 JOHN S. LEONARDO  
2 United States Attorney  
2 District of Arizona

3 ADAM R. SMART  
4 Assistant United States Attorney  
N.C. State Bar No. 31797  
5 Two Renaissance Square  
40 North Central Avenue, Suite 1200  
Phoenix, AZ 85004-4408  
6 Telephone: (602) 514-7500  
Fax: (602) 514-7760  
7 [Adam.Smart@usdoj.gov](mailto:Adam.Smart@usdoj.gov)

8 *Attorneys for the Federal Bureau of Investigation*

9  
10 UNITED STATES DISTRICT COURT  
11 DISTRICT OF ARIZONA

12 Abdul Khabir Wahid,

13 Plaintiff,

14 v.  
15

16 The Federal Bureau of Investigation,  
17

Defendant.

CV-15-01088-PHX-JJT (BSB)

**THE FEDERAL BUREAU OF  
INVESTIGATION'S OPPOSITION  
TO PLAINTIFF'S MOTION TO  
AMEND**

18 Defendant, the Federal Bureau of Investigation ("FBI"), through undersigned  
19 counsel, hereby opposes Plaintiff's motion to amend to convert this civil case from a  
20 motion to return property to a motion to unseal the affidavit supporting the search warrant  
21 used to seize the property at issue because the amendment is futile. Plaintiff has  
22 conceded that Defendant should prevail on its motion to dismiss Plaintiff's complaint  
23 seeking return of property. (Doc. 19, p. 2) ("Plaintiff does admit that the F.B.I. has met  
24 its responsibility and has returned the property."). However, any amendment to change  
25 the case to one seeking to unseal the affidavit would be pointless because the affidavit  
26 has already been unsealed. In addition, to the extent Plaintiff seeks to make a claim  
27 related to discovery or to use the proposed amended complaint as a de facto discovery  
28 request that too would be futile as courts do not recognize such causes of action. Because

1 these new claims are moot and not cognizable, the Court should deny the motion to  
2 amend as futile, and dismiss the civil action with prejudice.

3 **I. Background**

4 On June 10, 2015, agents for the FBI executed a search warrant at the home  
5 located at 3407 W. Port Au Prince Lane, Phoenix, Arizona. (*See Doc. 1, p. 2, p. 8* (first  
6 page of warrant); Declaration of Robert Byrne, ¶ 5 (Doc. 17-1)). During the course of  
7 executing that warrant the FBI seized several items located in the house, including  
8 several cell phones and computers. (*See Doc. 1, p. 6; Doc. 17-1, ¶ 5*). Plaintiff, Abdul  
9 Khabir Wahid was present at the residence at the time the warrant was executed, and was  
10 given a copy of the first page of the warrant and a list of the items seized (Doc. 17-1 ¶ 6;  
11 Doc. 1, pp. 7-8; Ex. A to Byrne Declaration (seizure inventory) (Doc. 17-2)). Five days  
12 later, on June 15, 2015, Plaintiff filed a motion for return of property, seeking the return  
13 of the cell phones and computers seized during the execution of the search warrant.  
14 (Doc. 1, p. 4, 3rd full paragraph, p. 5, 2nd full paragraph). That same afternoon, the FBI  
15 returned one of the cell phones Plaintiff requested returned in his motion. (Doc. 17-1,  
16 ¶ 8; Ex. B to Byrne Declaration (Receipt for Property) (Doc. 17-3)). Then on June 23,  
17 2015, the FBI returned the rest of the computers and cell phones that Plaintiff sought  
18 return of in his motion. (Doc. 17-1, ¶¶ 10, 12; Exs. C-D to Byrne Declaration (Receipts  
19 for Property) (Doc. 17-4, 17-5)). On April 6, 2016, Defendant filed its motion to dismiss  
20 Plaintiff's motion for return of property on the basis that all of the property Plaintiff was  
21 seeking had already been returned to Plaintiff. (Doc. 17). Instead of responding to the  
22 motion, Plaintiff filed a motion to amend his complaint, conceding that Defendant should  
23 prevail on its motion to dismiss, and instead now seeking to unseal the affidavit that  
24 supported the search warrant identified above. (Doc. 19, p. 2). However, according to  
25 the Clerk's office, the affidavit was unsealed yesterday, June 9, 2016, so his motion is  
26 pointless. *See* 15-9155MBB

27

28

1           **II. Legal Standard – Motion to Amend**

2           Under the current procedural posture, Fed. R. Civ. P. 15 controls. While Fed. R.  
 3 Civ. P. 15(a) allows a party to amend his complaint by leave of the court at any time, and  
 4 such leave “shall be freely given when justice so requires,” denial of a motion for leave to  
 5 amend is proper where there is bad faith, undue delay, prejudice to the opposing party, or  
 6 futility of the amendment. *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). “Futility  
 7 of amendment can, by itself, justify the denial of a motion for leave to amend.” *Id.*;  
 8 *Ajanovic v. O.F.F. Enterprises, Ltd.*, CV10-02487-PHX-DGC, 2012 WL 2285319, at \*3  
 9 (D. Ariz. June 18, 2012).

10          **III. Argument**

11          Plaintiff initiated this action by filing a motion for the return of property pursuant  
 12 to Federal Rule of Criminal Procedure 41(g). Case law establishes that when such a  
 13 motion is filed and no criminal proceedings are pending, the motion is treated as a civil  
 14 complaint. *See United States v. Ibrahim*, 522 F.3d 1993, 1007 (9th Cir. 2008); *United*  
 15 *States v. Kama*, 394 F.3d 1236, 1238 (9th Cir. 2005). Once Defendant filed its motion to  
 16 dismiss for lack of jurisdiction as all of the property sought by Plaintiff in the motion had  
 17 been returned (Doc. 17), instead of responding to Defendant’s motion by the May 9, 2016  
 18 deadline set forth in this Court’s April 7, 2016 Order (Doc. 18), Plaintiff filed his motion  
 19 to amend. In that motion to amend Plaintiff conceded that Defendant could prevail on its  
 20 motion to dismiss with respect to Plaintiff’s original motion for return of property. (Doc.  
 21 19, p. 2) (“Plaintiff does admit that the F.B.I. has met its responsibility and has returned  
 22 the property.”). However, the court now should deny the motion to amend as futile  
 23 because the affidavit is already unsealed. *Mackinney v. Nielsen*, 152 F.3d 927 (9th Cir.  
 24 1998).

25          Plaintiff has also included with his motion to amend a demand for documents and  
 26 information related to the warrant at issue, which is essentially a request for discovery.  
 27 However, a request for information or failure to provide discovery is not a cause of  
 28 action, and without an active cause of action there is no basis to serve discovery on the

1 United States or its agencies. *See Zigmund v. Tetreault*, No. 395CV2213(AHN)DFM,  
2 1997 WL 695502, at \*3 (D. Conn. Oct. 10, 1997) (there is no cause of action relating to a  
3 failure to respond to discovery); *Marozsan v. United States*, 849 F. Supp. 617, 645 (N.D.  
4 Ind. 1994), *aff'd*, 90 F.3d 1284 (7th Cir. 1996) ("There is no recognized civil cause of  
5 action for the failure or refusal of a party to provide discovery. Rule 37 of the Federal  
6 Rules of Civil Procedure, not a separate lawsuit, represents the proper and available  
7 remedy for an adversary's non-compliance with discovery requests."). Accordingly, the  
8 Court should refuse to allow Plaintiff to amend his complaint to a type of discovery  
9 request/complaint about not obtaining discovery from the United States or its agencies, as  
10 that claim is also futile.

11 **IV. Conclusion**

12 For the foregoing reasons, the Court should deny Plaintiff's motion to amend his  
13 complaint, as it would be futile.

14 Respectfully submitted this 10<sup>th</sup> day of June, 2016.

15  
16 JOHN S. LEONARDO  
17 United States Attorney  
District of Arizona

18  
19 *s/ Adam R. Smart*  
ADAM R. SMART  
20 Assistant United States Attorney  
21  
22  
23  
24  
25  
26  
27  
28

1                   **CERTIFICATE OF SERVICE**

2                   I hereby certify that on June 10, 2016, I electronically transmitted the attached  
3 document to the Clerk's Office using the CM/ECF System for filing and served a copy of  
4 the attached document and Notice of Electronic Filing to the following non-CM/ECF  
5 registrant via U.S. Mail:

6

7                   Abdul Khabir Wahid  
8                   3407 W. Port Au Prince Lane  
8                   Phoenix AZ 85053

9                   *s/Brian Wolfe*  
10                  \_\_\_\_\_  
10                  Office of the United States Attorney

11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28